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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)	
)	
)	PCHB 01-160
Appellant,)	
)	DENIAL OF SUMMARY JUDGMENT
CITIZENS AGAINST SEATAC)	
EXPANSION,)	
)	
Intervenor,)	
)	
v.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY and THE)	
PORT OF SEATTLE,)	
)	
Respondents.)	
)	

This matter comes before the board on a motion for summary judgment filed on January 4, 2002, by the Airport Communities Coalition (ACC). The summary judgment motion asks the Board to find that Ecology’s §401 certification is not based on a reasonable assurance the Port of Seattle (Port) has legal means to permanently mitigate the low flow impacts of its proposed Third Runway expansion. Specifically, ACC asks the Board to grant summary judgment for resolution of stipulated issue no. 9(a) which reads as follows: “[m]ust the Port obtain a water right to implement the low stream flow conditions in the certification and if so: (a) is there reasonable assurance that §401 and applicable water quality law will not be violated in the absence of such a water right.”

1 The Board, comprised of Kaleen Cottingham, presiding, and Robert V. Jensen, heard oral
2 arguments on the motions on February 4, 2002, and reviewed and considered the following
3 pleadings and documents, together with all attachments thereto, filed in support and in
4 opposition to the summary judgment motion:

- 5 1. ACC's motion and memorandum for summary judgment regarding the absence of a water
6 right for Third Runway §401 Certification;
- 7 2. CASE's response to ACC's motion for summary judgment re: necessary water right;
- 8 3. Ecology's response to ACC's motion for summary judgment regarding the absence of a
9 water right;
- 10 4. Port of Seattle's memorandum in opposition to ACC's motion for summary judgment
11 regarding the absence of a water right for Third Runway §401 Certification; and
- 12 5. ACC's reply on motion for summary judgment regarding the absence of a water right for
13 Third Runway 401 Certification.

14 Based on this review and being otherwise fully apprised in the circumstances of this case
15 the board enters the following:

16 As mentioned above, the Board is comprised of Kaleen Cottingham and Robert V.
17 Jensen. The third Board position is vacant. The Board may act even though one position of the
18 Board is vacant. RCW 43.21B.090. At least two members of the Board must agree to a decision
19 for it to be final. RCW 43.21B.100. In this instance, the two members reached contrary positions
20 on whether to grant summary judgment on issue no. 9(a). Ordinarily, where less than two
21 members are in agreement, the effect of the decision is to affirm the matter on appeal.

1 *Department of Ecology v. City of Kirkland*, 84 Wn.2d 25 (1974). However, in this case, the issue
2 before the Board is a motion for summary judgment. Therefore, the Board's split decision
3 results in a decision to deny the motion for summary judgment. The Conclusions of Law on
4 issue no. 9 (a) will be incorporated into the Final Findings of Fact and Conclusions of Law
5 issued following the hearing on the merits, either as a split decision or as a majority opinion and
6 dissent, depending on the composition of the Board.

7 For the above noted reasons the Board enters the following:

8 **ORDER**

9 ACC's motion for summary judgment is DENIED.

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11 SO ORDERED this 6th day of February, 2002.

12 POLLUTION CONTROL HEARINGS BOARD

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KALEEN COTTINGHAM, Presiding

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ROBERT V. JENSEN, Member